

63968-4

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NO. 63968-4-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

HONG PHAN,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

The trial court abused its discretion where it assessed a restitution award against Mr. Phan in the absence of sufficient evidence of causation, and in excess of the actual amount of harm caused by the offense committed.

B. ASSIGNMENT OF ERROR.

1. The trial court abused its discretion in imposing restitution where there was insufficient evidence linking Mr. Phan to the full extent of the damage incurred to the complainant's property, and by holding Mr. Phan financially responsible for unnecessary home improvements embarked upon by the complainant.

2. To the degree that the trial court's oral ruling can be construed as findings of fact, the court's findings were not supported by the evidence adduced at the restitution hearing.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

1. Restitution is allowed only for losses that are "causally connected to the crimes charged."¹ Where the restitution award is not sufficiently causally connected to the conviction, did the trial court abuse its discretion in imposing its restitution award?

¹ State v. Tobin, 132 Wn. App. 161, 130 P.3d 426 (2006).

2. A court's findings of fact must be supported by the evidence adduced at an evidentiary hearing or trial. Where the trial court failed to provide written findings of fact, and where the court's oral findings, such as they were, were not supported by the evidence adduced at the restitution hearing, must the court's findings be stricken?

D. STATEMENT OF THE CASE.

Hong Phan and his wife rented a home from Darlene Javne, which was located on 43rd Avenue in Kent. 6/11/09 RP 9-10.² Due to Mr. Phan's conduct at that property, he pleaded guilty on April 25, 2008, to Attempted Violation of the Uniform Controlled Substances Act (VUCSA), for the Attempted Manufacture of Marijuana. CP 13-25.

The court ordered a 12-month suspended sentence, in addition to 24 months supervised probation and 30 days electronic home detention. 4/24/08 RP 10; CP 10-12. The court also scheduled a restitution hearing.

At the restitution hearing, Darlene Jevnes testified that she was the owner of the house located on 43rd Avenue, and had rented

it to Mr. Phan through a property management company. 6/11/09 RP 9. The house was built in 1964. 6/11/09 RP 32. She also stated that the home was in perfect condition when Mr. Phan rented it for a lease term of one year in October 2006. 6/11/09 RP 10, 63.

When Ms. Jevnes, the landlord, gained access to the house again in September 2007, she found that Mr. Phan had been using the house to grow marijuana. 6/11/09 RP 13-18. Due to this activity, parts of the house sustained damage caused by heat, humidity, and exposure to the fertilizer and other chemicals used by Mr. Phan. Id. at 13-30.

Ms. Jevne testified to an array of home improvements that she had commenced, following the arrest and eviction of her tenant, Mr. Phan. These home renovations included the upgrade of several areas of the house for which there was no testimony concerning damage caused by Mr. Phan. 6/11/09 RP 22, 42, 59. Ms. Jevne received \$113,000 from the USAA insurance company, and still sought additional restitution from Mr. Phan for additional renovations. 7/30/09 RP 7. The State also sought reimbursement for the insurance company's losses. 7/30/09 RP 7.

² The verbatim report of proceedings consists of five volumes of transcripts from April 24, 2008, through July 30, 2009. The proceedings will be referred to herein by the date of proceeding followed by the page number, e.g. "4/24/08 RP ___." References to the file will be referred to as "CP."

Mr. Phan timely appeals. CP 32-34.

E. ARGUMENT.

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ASSESSED A RESTITUTION AWARD AGAINST MR. PHAN WITH INSUFFICIENT EVIDENCE OF CAUSATION FOR THE AMOUNT OF RESTITUTION AWARDED.

1. Restitution is allowed only for losses that are “causally connected” to the crimes charged. Losses are causally connected if, but for the charged crime, the victim would not have incurred the loss. State v. Griffith, 164 Wn.2d 960, 965-66, 195 P.3d 506 (2008), citing State v. Tobin, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007) (internal citations omitted).

In Griffith, the Supreme Court noted that the defendant had not pled guilty to a crime of theft, but only to the crime of possession of stolen property. 164 Wn.2d at 967. Rather than assessing that defendant restitution in the amount of the property she had admitted to possessing, the lower court had imposed a restitution order for the total amount of property stolen from the complainant. Id. at 962-63. The Griffith court held that the evidence supporting the restitution order was not only “skimpy,” as the State had conceded, but legally insufficient. Id. at 967. “Culpability for possession of stolen property does not necessarily include culpability for the stealing of the property. The actual thief is guilty of a different crime.” Id. (citing

Griffith, 136 Wn. App. 885, 894, 151 P.3d 230 (2007) (Schultheis, J., dissenting) (internal citations omitted).

2. There was insufficient evidence causally linking Mr. Phan to the extent of the damage incurred to the complainant's property. The trial court ordered restitution on July 30, 2009, ordering Mr. Phan to pay the complainant Ms. Jevnes \$31,183.43, and the USAA Insurance Company \$86,905.37 for damage incurred to the house located on 43rd Avenue. CP 30-31.

The only evidence relied upon by the trial court in imposing the restitution order was the complainant's testimony concerning her observation of the condition of her home, along with a few photographs and receipts proffered at the restitution hearing. The trial court clearly relied upon testimony that was insufficient to prove causation under the applicable legal standard; thus, the court's restitution order was imposed in an abuse of discretion, and must be vacated. See Griffith, 164 Wn.2d at 967-68.

The standard is clear that for a causal connection to be shown, the State must prove that "but for" the charged crime, the victim would not have incurred the loss. Griffith, 164 Wn.2d at 965-66, Tobin, 161 Wn.2d at 524. Here, the evidence was insufficient to show that but for Mr. Phan having used the home to cultivate

marijuana, the victim's home would have needed a gut renovation, including full marble and tile bathrooms, new flooring, new aluminum siding on the outside of the house, and all of the other improvements about which Ms. Jevne testified. 6/11/09 RP 25, 29, 31. Ms. Jevne also testified to her need for 16 months of rent money to compensate her for her losses. Id. at 42.

Rather, the evidence showed that Mr. Phan's conduct, while admittedly criminal, created an opportunity for Ms. Jevne to perform many elective renovations to her 45 year-old home -- upgrading formica counters to granite and marble, and purchasing custom draperies costing \$14,885. 6/11/09 RP 51; 7/30/09 RP 16-17. Ms. Jevne also stated that despite the fact that the windows of the house were all sealed against light and moisture, the marijuana had somehow damaged the aluminum siding on the outside of her house, leaving a residue of "sticky" spots on her home's exterior. 6/11/09 RP 22. For this, too, she asked the court to compensate her with brand new siding.³

The trial court awarded the complainant restitution for renovations such as these, for which the insurance company had

³ Ms. Jevne conceded that the insurance company had refused to compensate her for the aluminum siding, although they had been "generous" to her, she supposed, because she had purchased a fire policy and not a rental policy. 6/11/09 RP 42.

refused to compensate her. As Ms. Jevnes stated during the restitution hearing, the insurance company “wouldn’t look at replacing the siding on the outside of the house with the stains. They just said, no. They wouldn’t do it. It’s not a fully replaceable cost.” 6/11/09 RP 42. That the insurance company would balk at residing a 45 year-old house is not surprising. What is quite surprising is that the trial court would enable the opportunism permitted here, under the veil of the restitution statute.

Although Ms. Jevne failed to provide any photographs indicating damage caused by Mr. Phan to the windows or cabinetry of the house, she hired contractors to remove and replace every single window and cabinet in the house. 6/11/09 RP 25. Although the complainant was unable to provide a move-in checklist at the hearing, the trial court failed to make any findings about this middle-aged home’s original condition before Mr. Phan’s activities. 6/11/09 RP 10. The complainant also testified that she had replaced all of her kitchen appliances following Mr. Phan’s arrest, noting that he had apparently kept “ethnic food in the refrigerator that wreaked [sic] in there and we scrubbed and scrubbed.” 6/11/09 RP 29.⁴

⁴ The State later withdrew the request for restitution for the replacement of Ms. Jevne’s oven, due to Mr. Phan’s culinary activities, but maintained their request for the replacement cost of her new refrigerator. 6/11/09 RP 72.

3. The restitution order must be vacated. In the absence of sufficient evidence connecting Mr. Phan's criminal conduct to the extent of the damage to the complainant's home, the restitution order must be vacated. Griffith, 164 Wn.2d at 967-68. Unless a defendant agrees, restitution cannot be imposed based on a "general scheme" or acts "connected with" the crime charged, when those acts are not part of the charge. State v. Woods, 90 Wn. App. 904, 907-08, 953 P.2d 834 (1998).

Here, Mr. Phan agreed that he was responsible for a certain amount of the damage to Ms. Jevne's property; however, his offer of restitution did not include the items that her insurance company declined to cover, such as the aluminum siding. 7/30/09 RP 18-19; Ex. 24. Where the State has failed to show that that Mr. Phan's conduct caused the extent of the damages claimed by the complaining witness, the restitution award must be vacated. State v. Taylor, 86 Wn. App. 442, 446, 936 P.2d 1218 (1997) (reversing restitution award where State failed to demonstrate that defendant's criminal acts caused amount of losses claimed by State).

In addition, the trial court failed to provide written findings. Even if the court's oral ruling is construed as findings of fact, the

court's findings here were not supported by the evidence adduced at the restitution hearing, which was held over a period of two days. Because the court failed to make findings based upon the evidence, any construed findings must be stricken.

Finally, since the trial court's restitution order was issued in an abuse of discretion, the order must be vacated.

F. CONCLUSION.

For the foregoing reasons, Mr. Phan respectfully requests this Court reverse the restitution order and remand the case for further proceedings.

DATED this 19th day of January, 2010.

Respectfully submitted,



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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF JANUARY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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